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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

NO.

76-7111

**BENJAMIN MICHAEL FELICIANO,
JESSE DAVIDSON,**

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

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The Petitioners, Benjamin Michael Feliciano and Jesse Davidson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered on October 21, 1976.

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered on October 21, 1976, which is presently unreported is set forth in the Appendix (pp. 1A - pp. 11A).

JURISDICTION

Jurisdiction to review the judgment entered by the United States Court of Appeals for the Fourth Circuit on October 21, 1976, is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Did the trial court err in its charge to the jury as to what it was required to find under Count I, and in failing to charge in the context of a "fixed" horse race as to Counts VIII, IX and X, and were the charges so misleading and confusing as to constitute reversible error?

2. Did the evidence establish bribery under 18 U.S.C. §224 and was the evidence sufficient to connect the jockey defendants with a conspiracy to bribe?

3. Is horse racing a sporting contest within the meaning of that term as used in 18 U.S.C. §224 prohibiting bribery in sporting contests?

4. Does 26 U.S.C. §6041 require the name of the true winner and is that section so impermissibly vague as to be violative of due process and was there a failure of proof of intent as to that Count?

5. Did the Government prove use of interstate facilities in interstate commerce?

6. Did the Government prove that the jockey defendants willfully caused interstate travel?

7. Does 18 U.S.C. §1343 require that the interstate use of a telephone was caused by the jockey defendants for the purpose of executing a scheme or artifice to defraud?

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of 18 U.S.C. §2, §224, §371, §1343, §1952 (a) (1) and (2) (b), 26 U.S.C. §6041 and §7206 (2), 28 U.S.C. §1254 (1), 26 C.F.R. §1.6041-5 and MD. CRIM. LAW CODE ANN. §24 are set forth in the Appendix (pp. 12A-16A).

STATEMENT OF THE CASE

On February 14, 1975, Eric Walsh¹, Benjamin Feliciano, Jesse Davidson and Luigi Gino (hereinafter often referred to as

¹Eric Stephen Walsh died while the appeal to the U. S. Court of Appeals for the Fourth Circuit was pending and an order was entered abating the judgment of his conviction and dismissing the indictment against him. However, for purposes of clarity and continuity, he will be referred to in this petition as one of the jockey defendants.

the jockey defendants) were scheduled to ride horses in the 9th race at Bowie Race Course at Bowie, Maryland. Each of these defendants, according to the testimony, either did not like the horse he was scheduled to ride or had no confidence in it.

In preparing for the race, the jockey defendants individually looked at the Daily Telegraph, a racing newspaper setting out past performance records of all the horses scheduled in each race on the card for the day. Recognizing that their horses did not look like factors in the race, based on the Daily Telegraph and what was known to them individually, jockey defendants Gino and Feliciano accurately guessed that the horses 8, 12 and 2 looked like the horses most likely to figure in the race. This guess was arrived at by the simple process of recognizing horses which because of one problem or another did not look like factors in the race.

While the horse ridden by unindicted co-conspirator, Carlos Jimenez, did not look impressive on paper and was neither a betting or program favorite, the odds on that horse making it one of the long shots, Feliciano nevertheless asked Jimenez whether he liked his horse. Although Jimenez originally testified that he liked his horse, he subsequently admitted that he did not in fact like his horse and that since his horse could not have won the race, he did not have to "hold" or "pull" his horse. Further, Jimenez testified that he rode the race to the best of his ability and that in his opinion the race was not "fixed".

Money for the purchase of 38 box Trizacta tickets each costing \$18.00 was given by the respective jockeys, in the case of Jimenez by his valet Donald Teague, to Gino. This type ticket requires picking the three horses which finish in the money but does not require that they be picked in the order of finish. After receiving the money from the jockeys, Gino in turn gave it to Ernest Davidson, the brother of Jesse Davidson, who in turn purchased the tickets and gave them to Gino after the 9th race. The tickets were then distributed to the various jockeys who purchased them.

With regard to the race itself, Merrall MacNeille, one of

the track stewards, testified that after viewing the race on film, only jockey Baboolal's ride of the #1 horse, Peace Frog, seemed unusual. Jockey Baboolal explained his ride the next day to the satisfaction of the track stewards. Not until four days later after receiving a verbal list of jockeys from the track security agent, Paul Berube, whom he thought merited "particular attention" and after track supervisors noticed that thirty-nine out of the total sixty-two winning eighteen dollar tickets had been purchased at one window in the clubhouse did the stewards decide again to look at the film of the 9th race.

Furthermore, whereas the patrol judges make a running commentary on the day of the race and on the day following the race are required to make a written report, there was no report by any such judge as to any irregularity during the 9th race. Additionally, there was no report of irregularity received from the jockey room custodian, the paddock judges or the starter with respect to the 9th race. Gregg McCarron, a highly successful and respected rider, observed nothing in the race to indicate that any of the jockeys deliberately hampered the performance of their horses. Experienced trainers, such as Bernard Bond and Nancy Heil, testified that they observed the race and saw nothing unusual.

Although the jockey defendants admitted the purchase of Trizacta tickets other than on the horses which they rode and recognized that this was a violation of the rules of the Maryland Racing Commission, they vigorously denied that they ever attempted to "fix" the 9th race or that the 9th race was "fixed".

Meanwhile, the jockey defendants were attempting to cash their winning tickets. On Sunday, February 16, Walsh, Jimenez and Jesse Davidson met at Walsh's apartment to discuss how the tickets could be cashed. Although Jimenez had not experienced difficulty with the police in getting two tickets cashed, Walsh and Gino had been unable to cash their tickets. In fact, Gino had sought the aid of his friend, Heddy Sue Way and her sister Janet Gayle Harless, but they had been unable to cash his tickets despite several attempts.

On Friday, February 14, Walsh had telephoned William Michael Vuotto to see if he knew anyone who could cash some

tickets. Walsh and Vuotto agreed to meet the next morning, and Vuotto received fifteen tickets at that time. Vuotto placed the tickets in a safe deposit box and then went to Ocean City, Maryland. On February 17, Vuotto attempted unsuccessfully to contact Defendant Edward Bishop.

On Tuesday, February 18, Vuotto contacted Bishop and asked him if he knew anyone who could cash some tickets. Bishop called Vuotto later to say that he would send someone within the next day or so to cash the tickets.

On Wednesday, February 19, Vuotto received nineteen additional tickets from Walsh, and then went to the track that afternoon where he met Bishop and gave him the tickets. Despite the arrangements for the transfer of monies and tickets, Bishop returned one hour later and gave Vuotto the thirty-four tickets and said that his people had been unable to cash them.

On February 19, 1976, Defendants Nicholas Iacona and Louis J. Summa appeared at Bowie Racetrack, each in possession of seventeen winning tickets from the 9th race on February 14, 1976. They were informed by Alfred M. Hinsley, a Thoroughbred Racing Protective Bureau Detective, that they would have to see Mr. Paul Berube. Defendants Iacona and Summa then approached Mr. Berube who informed them that the tickets could not be cashed because they were the subject of a pending investigation.

That evening, Vuotto returned the tickets to Walsh's apartment and the tickets were subsequently destroyed.

On May 21, 1975, a federal grand jury for the District of Maryland returned a thirteen count indictment charging Eric Steven Walsh, Luigo Gino, Benjamin Michael Feliciano and Jesse Davidson with violation of 18 USC §371, Conspiracy to Commit Sports Bribery; 18 USC §224, Sports Bribery; 18 USC §2, Aiding and Abetting; 18 USC §1952 (a) (1), Interstate Transportation in Aid of Racketeering; Art. 27, Md. Annot. Code §24; 18 USC §1343, Fraud by Wire and 26 USC §7206 (2), Conspiracy to Make Fraudulent Representations to the Internal Revenue Service. Nicholas Anthony Iacona, Louis J. Summa and Edward Bishop were also joined as accused in Count Seven of the indictment charging violation of 26 USC

§7206 (2), Conspiracy to Make Fraudulent Representations to the Internal Revenue Service. All defendants except Edward Bishop appeared for Arraignment on June 2, 1975, entering pleas of not guilty as to each and every count of the indictment. Edward Bishop was arraigned and entered a plea of not guilty on June 5, 1975.

Trial was held before the Honorable Joseph H. Young, commencing September 4, 1975. At the outset of the trial, defendants Bishop, Summa and Iacona moved for a severance of their case from the case of the jockey defendants, said Motions being denied. At the close of the Government's case on September 10, 1975, all defendants moved for a Judgment of Acquittal on all counts. Upon the Oral Motion of the Government, Counts Twelve and Thirteen were dismissed. Upon Defendant's Motion, Count Eleven was also dismissed. The case was concluded on September 16, 1975, and each defendant renewed Motions for Judgment of Acquittal on all remaining counts. These Motions were denied.

The jury returned a verdict of guilty against jockey defendants Walsh, Feliciano, Gino and Davidson on Count One, conspiracy to commit sports bribery; Counts Five and Six, interstate transportation in aid of racketeering; Count Seven, conspiracy to make fraudulent representations to the Internal Revenue Service; Counts Eight, Nine and Ten, fraud by wire. Defendants Iacona, Summa and Bishop were also found guilty on Count Seven.

On November 28, 1975, jockey defendants Walsh, Feliciano, Gino and Davidson were sentenced as follows:

"committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and to pay a fine of One Thousand Dollars (\$1,000) as to each of Counts Nos. 1, 5, 6, 7, 8, 9 and 10 on condition that defendant be confined in a jail-type or treatment institution for a period of six (6) months; service of remainder of sentence of imprisonment only is suspended and defendant is placed on probation for the period of thirty (30) months upon the usual conditions of probation. Sentence imposed

as to each of Counts Nos. 5 through 10 to run concurrently with Count No. 1 and fine imposed as to each of Counts Nos. 5 through 10 to be non-cumulative with Count No. 1 making a total of six months imprisonment, 30 months probation and One Thousand Dollars (\$1,000) fine."

On October 21, 1976, the United States Court of Appeals for the Fourth Circuit in Nos. 76-1094 and 76-1095 affirmed the convictions of the Petitioners herein.

REASONS FOR GRANTING THE WRIT

I.

THE COURT ERRED IN THE CHARGE TO THE JURY AS TO THAT WHICH THE JURY WAS REQUIRED TO FIND TO CONVICT UNDER COUNT I AND FURTHER ERRED IN FAILING TO CHARGE IN THE CONTEXT OF A "FIXED" RACE, UNDER COUNTS VIII, IX AND X, AND IN CHARGING IN TERMS OF A VAGUE, IMPRECISE AND INADEQUATE STANDARD AS TO THE REQUISITE ELEMENTS OF THE TYPE OF FRAUD CHARGED: THAT THE CHARGE WAS SO MISLEADING AND CONFUSING AS TO CONSTITUTE REVERSIBLE ERROR

There was no violation of 18 U.S.C. §224 as charged in Count I if the jockey defendants conspired to *fix* the race. There must have been an agreement by two or more of the defendants to *bribe* a participant in the 9th race at Bowie Race Track on February 14, 1975, as evidenced by 18 U.S.C. §224 which provides in pertinent part:

"Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, *by bribery* any sporting contest ***." (Emphasis added).

The government sets up in the indictment conspiracy to bribe Carlos Jimenez as the proscribed conduct. More specifically, Count I charges that the jockey defendants conspired to commit sports bribery, to wit, the bribery of Carlos Jimenez. It was this contention by the government which gave the trial court subject matter jurisdiction. Moreover, the government conceded in rebuttal argument that without the attempt to bribe Jimenez, there would have been no prosecution.

Against this background, however, the Court instructed the jury as to the three essential elements required to be proved to sustain a conviction as to Count I as follows:

"First, the act or acts of conspiring to directly or indirectly offer or promise to *jockeys* in the 9th race at Bowie, on February 14, 1975, information or any other things of value as charged in the indictment.

Secondly, doing such act wilfully and corruptly, and, third, doing such act with the intent to influence a performance of *jockeys* in the 9th race, *as charged*." (Emphasis added).

The Court's charge to the jury speaks in terms of "jockeys". Yet, the cornerstone of the government's case on Count I was that the jockey defendants conspired to bribe one jockey, Carlos Jimenez, not a number of jockeys. It is submitted that the charge led the jury away from the critical finding which it was required to make, to wit, a conspiracy of the jockey defendants to bribe Carlos Jimenez.

To make matters worse, the Court further instructed the jury on Count I as follows:

"The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all means or methods, which were agreed upon, were actually used or put into operation, nor that all the persons charged to have been members of the alleged conspiracy were members.

"What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that *one or more of the means or methods described in the indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment*, and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the indictment. (Emphasis added).

"In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not a conspiracy existed as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused, or any of them willfully became members of the conspiracy.

" "If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed, and that the defendants wilfully became members of the conspiracy either at its inception or afterwards, and that thereafter *one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or some purpose of the conspiracy*, then there may be a conviction, even though the conspirators may not have succeeded in accomplishing their common object, or purpose, and in fact may have failed of so doing." (Emphasis added).

By allowing the jury to speculate as to one or more of the means or methods or of the overt acts which the Court charged would be adequate to support a finding of guilt, the Court again led the jury away from the critical finding which it was required to make, to wit, the conspiracy to bribe Carlos Jimenez. For example, the jury could have found as a matter of fact that the jockey defendants purchased certain triple pari-mutuel wagering tickets on the 9th race as charged in paragraph 8 of the indictment as one of the "means or methods" and that Ernest Davidson purchased 38 tickets for the 9th race on the triple pari-mutuel wagering combination of 2-8-12 at betting window 108 as charged in paragraph 4 of the indictment as one of the "overt acts". Based on these facts, the jury could have returned a guilty verdict as to Count I and such a verdict would have been in accordance with the Court's instruction. Yet, neither finding of fact is related to the gravamen of the government's case as to Count I, to wit, the conspiracy to bribe Carlos Jimenez.

The jury should have been compelled to find the overt act and the means or method upon which it relied to support a

guilty finding on Count I indeed related to the "sports bribery" charged in the indictment. Rather than being required to focus on these critical findings, the jury was allowed to divert its attention from the focal point of the offense charged in Count I which was the conspiracy to bribe Carlos Jimenez.

Despite the obvious confusion caused by the Court's misleading instructions to the jury on Count I, the Fourth Circuit's opinion is glaringly devoid of any discussion and analysis of this issue. The only finding made by the Fourth Circuit is that 18 U.S.C. §224 (conspiracy to effect a sporting contest by bribery) encompasses bribery schemes originated by participants in a sporting contest as well as those initiated by outsiders or non-participants. Petitioners do not dispute this conclusion. However, the Fourth Circuit's failure to squarely address the central issue posed by the trial court's instruction on Count I fails to account for the possible absurd result whereby the jockey defendants could have been found guilty of conspiring to bribe themselves. It is submitted, therefore, that the charge as to Count I constitutes plain error.

Similarly, the Court's instructions on Counts VIII, IX and X were confusing and led the jury away from a consideration of the central issue, to wit, whether the defendant jockeys fixed the race. Specifically, Count VIII charged the defendants with having "knowingly devised and intended to devise a scheme and artifice to *defraud* the people of the State of Maryland," e.g. to fix a race. Yet, the Court charged the jury that as to the "fiduciary relationship" which existed between the jockey defendants and "the owners and trainers for whom they rode, or to the Maryland State Racing Commission, or to the bettors at Bowie Race Track on that date," the jockey defendants could be found guilty if the jury was convinced that they "contemplated some actual harm or injury to those with whom (they) had a fiduciary relationship."

A clear and unequivocal statement that betting alone was not sufficient to support the crimes charged, coupled with a precise statement of the requisite intent in terms of the specific criminal charge, were imperative for the jury to place the matter before it for consideration in proper perspective. The problem is well expressed in *Bollenbach v. United States*, 326 U.S. 607,

612 (1946). "Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge"

The crucial element in a scheme to defraud is proof of a fraudulent intent on the part of the defendant, that specific requisite intent not here being covered by the charge in a manner that was sufficiently or properly instructive to the jury. *United States v. George*, 477 F.2d 508, 513 (7th Cir., 1973); *United States v. Regent Office Supply Company*, 421 F.2d 1174, 1180 (2d Cir., 1970); *United States v. Lichota*, 351 F.2d 81, 89 (6th Cir., 1965); *United States v. Painter*, 314 F.2d 939, 943 (4th Cir., 1963). A conviction cannot rest on an equivocal direction to the jury on a basic issue. *Bollenbach v. United States*, *supra*; see also *Perry v. United States*, 422 F.2d 697 (D.D. Cir., 1969). It is moreover fundamental that the ultimate question is "whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors." *Perez v. United States*, 297 F.2d 1216 (5th Cir., 1961). Such confusion was most certainly here implanted in the jurors' minds.

The significance to be attached to the charge and the requirement that the charge not be misleading by any specific erroneous statement contained therein finds clear expression in the Fourth Circuit's opinion in *United States v. Mogavero*, 521 F.2d 625 (4th Cir., 1975) where Judge Winter, writing for an undivided court, stated at page 628:

"The erroneous instruction was addressed to specific findings—application of the general statements to the facts as the jury might find them and the form of verdict which would follow. As a consequence, we think it unlikely that the jury, in making the specific finding of guilt or innocence, would correctly apply the general statements in the contravention of the district court's literal language. Thus, we cannot conclude that the error was overcome."

The charge, moreover, undermined the closing arguments of counsel for the jockey defendants which rejected the proof of a "fixed" race. In *Griego v. U.S.*, 298 F.2d 845 (10th Cir., 1962) it was held that instructions were erroneous which

excluded from jury consideration affirmative defenses as to which evidence had been received. The problem is placed in sharp focus by the holding in *Strauss v. U.S.*, 376 F.2d 416 (5th Cir., 1967), that by failing to charge on a specific defense the trial Court diluted the defendant's jury trial by removing issues from the jury's consideration and, in effect, erroneously directing a verdict on that issue against the defendant.

Finally, in order to prove a fraud within the meaning of the Wire Fraud Act, there must be a purpose to do harm which amounts to fraudulent intent. If the race was honestly run, there was no fraud within the meaning of the Act. If the race was fixed, disclosure would have made no difference. See e.g., *Epstein v. United States*, 174 F.2d 754, 768, 769 (6th Cir., 1949). The concealment of the jockey defendants' betting in the ninth race was not a fraud without a finding of intent on their part to run a dishonest race, i. e. hindering the performance of his horse or agreeing together to get another jockey to hinder the performance of his mount. What would have harmed the public, the owners and trainers was a fixed race. A scheme to fix a race would be a fraud within the meaning of Section 1343. Whether or not the jockeys indeed fixed the race was a question that should have been submitted to the jury.

II.

THE EVIDENCE FAILED TO ESTABLISH ANY BRIBERY AND WAS INSUFFICIENT TO CONNECT ANY OF THE JOCKEY DEFENDANTS WITH ANY CONSPIRACY TO BRIBE

The essential allegations of Count I charged that the jockey defendants conspired to "provide information and other things of value as an inducement to Carlos A. Jimenez. . ." to have him inhibit his performance in the 9th race at Bowie. The only direct evidence, however, on the bribery allegation is the testimony of the unindicted co-conspirator, Carlos A. Jimenez. According to the testimony adduced at trial, Feliciano offered neither information nor anything of value prior to asking Jimenez if he wished to pull his horse. Moreover, even after Jimenez agreed, Feliciano did not offer money or any other consideration, but told Jimenez what it would cost him

to bet on the race. Furthermore, Jimenez testified that he did not pull his horse. Thus, the evidence introduced by the Government at trial failed to establish that the defendants, or any one of them, offered Jimenez either information or anything of value in order to induce him to inhibit his performance.

It is well recognized that the crime of bribery requires two essential elements: (1) participation by at least two persons, and (2) concert of action between those persons. In addition, the gist of a charge of accepting a bribe is the intent of one at the time of receipt of the money to have his decision or action in a matter influenced thereby. *U.S. v. Henry*, 52 F.Supp. 161 (D.Nev., 1943). The Court in *U.S. v. Canella*, 63 F.Supp. 377 (S.D. Calif., 1945), described bribery in slightly different words when it said at page 379:

"The gist of the offense is . . . the acceptance of money, contracts or gratuities with the *understanding* that the . . . conduct shall be influenced."

The Ninth Circuit, moreover, held in *U.S. v. Teed*, 185 F.2d 561, 563 (9th Cir., 1950) that where parties, who obtained money from a physician (Dr. Teed) for the alleged purpose of bribing a federal narcotics agent, had no intention of using the money for a bribe and nothing was ever promised, offered or given, neither bribery, attempted bribery or conspiracy to commit bribery existed.

Therefore, since there was no inducement to the co-conspirator Jimenez and according to his own testimony, his conduct during the 9th race was not influenced, there was a failure to establish the requisite elements of bribery.

The government also failed to introduce evidence at trial that any of the jockey defendants were part of a conspiracy to bribe Jimenez. The government's evidence as to the jockeys, coming exclusively from Jimenez, is that he, Davidson, Walsh and Gino were playing cards early on February 14 in the jockey's room, that he saw Davidson dividing up the tickets on February 14 after the race and that he saw Davidson return his tickets to Walsh for cashing on February 16. While this evidence would be

enough to establish that Davidson participated with the others in betting on the ninth race, one cannot conclude therefrom that Davidson, Walsh or Gino had any knowledge of the alleged conversation between Feliciano and Jimenez. The reasoning must be that because Jimenez was allegedly asked by Feliciano to pull his horse and both of them had tickets on the ninth race, therefore, since the other jockeys also had tickets, they must have known of a conversation between Feliciano and Jimenez. This type of reasoning, which is based only on evidence of association, has been judicially described a perversion of logic — *i.e.*, if (A) bribes (B), and (C) is associated with (A), then (C) must have also taken a bribe — “this is a classic *non sequitur*.” *Ong Way Jong v. United States*, 245 F.2d 392, 394 (9th Cir., 1957). The law, moreover, is clear that proof of association is insufficient to permit a charge of conspiracy to be submitted to the jury. *United States v. Falcone*, 311 U.S. 205, 207, 210 (1940); *United States v. Cirillo*, 499 F.2d 872 (2d Cir.), *cert. denied* 95 S.Ct. 638 (1974); *United States v. Stromberg*, 268 F.2d 256 (2d Cir., 1959). Furthermore, it is fundamental that a conviction for conspiracy cannot be sustained without proof of an agreement to attain a criminal objective. *Ingram v. U.S.*, 360 U.S. 672, 677-678 (1959). That key element was lacking as to defendants Walsh, Davidson and Gino.

Finally, even were it found that the government adduced some proof of a conspiracy, the proof shows not one overall agreement lasting from February 14 to February 20 or 21 as alleged in Counts I and VII, but many separate agreements between the defendants.

The first conspiracy was complete when each of the jockeys received his tickets and, by the uncontradicted proof, went his separate way to arrange for cashing. Only after a distinct break did the jockeys, minus one who originally had tickets (Baboolal), join together to attempt cashing. In fact, not until two days later did the defendants attempt to get all the tickets together to cash them, and even then there is a lack of evidence of a single agreement, since on Monday following the race, according to Jimenez, Walsh refused to try to cash his tickets while Feliciano agreed to do so.

Thus, the government's theory underlying the allegations of Counts I and VII of one continuing agreement to cash the winning tickets is not supported by the evidence introduced at trial. Moreover, the government certainly should be precluded from putting together several defendants in one conspiracy when the proof shows many separate conspiracies. *Kotteakos v. United States*, 328 U.S. 750 (1946). As was stated in *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir., 1964):

Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant.”

The scope of any alleged conspiracy must be determined individually as to each defendant, *United States v. Falcone*, *supra*; *United States v. Borelli*, *supra*. There is no evidence from which a reasonable juror could have concluded beyond a reasonable doubt that any of the jockey appellants were part of one conspiracy extending from February 14 to February 20 or 21. Here, the evidence shows that assuming a conspiracy existed on February 14, it ended that night with distribution of the tickets.

Since the sports bribery conspiracy, if it existed, ended the night of February 14, there was absolutely no evidence of any conspiracy “to carry into effect any scheme in commerce” to commit sports bribery under 18 U.S.C. §224. Both the wording and legislative history of 18 U.S.C. §224 leave no room for doubt that an offense within the meaning of §224 must be carried into effect by using interstate facilities in interstate commerce.² Yet, there was a total lack of proof of any use of

²“The purpose of this regulation is to make it a federal crime to influence a sporting contest by bribery. For such conduct to constitute a federal offense it must be done through the facilities of interstate or foreign commerce.” *United States Code and Administrative News*, p. 2251, 88th Cong., 2d Sess. (1964). See also, Vol. 110, Cong. Record, Part 1 at 920-922, 88th Cong., 2d Sess. (1964).

any facility in interstate commerce during the alleged conspiracy to commit sports bribery.

III.

COUNT I ON ITS FACE FAILS TO ALLEGE AN OFFENSE BECAUSE HORSE RACING IS NOT A SPORTING CONTEST WITHIN THE MEANING OF THAT TERM AS USED IN 18 U.S.C. §224 PROHIBITING BRIBERY IN SPORTING CONTESTS

On its face, 18 U.S.C. §224 does not prohibit bribery affecting the outcome of horse races. The statute prohibits "Bribery in Sporting Contests" and further provides a specific definition for what sporting contests are covered:

"The term 'sporting contest' means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence . . ."
18 U.S.C. §224 (c) (2)

Based on the plain words of this statute, horse racing does not fall within the sporting contests covered.

The judicial power of the federal government is limited and its courts can only exercise jurisdiction where Congress has specifically provided for it. *Cary v. Curtis*, 44 U.S. 236, 245 (1845). *Accord Lockerty v. Phillips*, 319 U.S. 182, 187-188 (1943). Moreover penal laws are to be construed strictly which "is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

Finally, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808 (1971) citing *Bell v. United States*, 349 U.S. 81, 83 (1955).

Horse racing is not a contest between individual contestants or teams of such contestants as required by the statute. A horse race is a competition between animals ridden by jockeys. The statute evidences no intent to encompass sporting contests between animals; it is limited to contests between "individual

contestants". Not only does the general usage of the words employed exclude animals, but also the statute itself equates individuals with "persons" in subsection (c) (3).³

Because the plain words of the statute construed in light of the controlling principles of statutory construction preclude its application to horse races, resort to the legislative history is neither appropriate nor necessary. That history confirms, however, that the statute was not directed at races involving animals, particularly races on which pari-mutuel betting is allowed. On the contrary, the evils cited which prompted the bill were the intrusion of gambling interests into collegiate and professional baseball, football and basketball. The support of organizations controlling team sports involving individuals was noted.⁴

Federal intervention was justified by statements as to the absence of effective state regulation of bribery in the sports cited.⁵ No similar absence of state regulation could be marshalled to support federal intervention to control horse racing. Horse racing is one of the most heavily state-regulated sports as evidenced by the fact that every state that allows racing has a statutory scheme creating a regulatory body to supervise its conduct. Furthermore, nearly all of the states which allow horse racing have their own sports bribery statutes.

³The Second Circuit has rejected this argument in *United States v. Pinto*, 503 F.2d 718, 724 (2d Cir., 1974).

⁴Senate Report No. 2003, pp. 4, 5 (87th Cong. 2d Sess. 1962); 108 Congressional Record 19174, 19175 (1962); Senate Report No. 593, pp. 2, 3 (88th Cong. 1st Sess. 1963) 110 Congressional Record 920, 921, 922 (1964).

⁵Senate Report No. 593, p. 3 (88th Cong., 1st Sess. 1963); U.S. Code and Adm. News, 88th Cong., 2d Sess. p. 2251 110 Cong. Rec. 920 (1964).

IV.

THE EVIDENCE FAILED TO ESTABLISH A VIOLATION OF COUNT VII SINCE 26 U.S.C. §6041 DOES NOT REQUIRE THE NAME OF THE TRUE WINNER, IS IMPERMISSIBLY VAGUE AND AS SUCH, THERE WAS A FAILURE OF PROOF OF INTENT AS TO THAT COUNT

Count VII charges the jockey defendants with a conspiracy to violate 26 U.S.C. §7206 (2) on the theory that they aided and abetted the Bowie Race Track in filing false and fraudulent tax returns by having the defendants Summa and Iacona cash the tickets and fill out a 1099 information return when the defendants knew that the true winners of the wagers are required to prepare the return. This theory is fatally defective in that: a) The indictment fails to charge the offense of conspiracy to violate §7206 (2); b) No statute or regulation requires the "actual winner" to fill out the 1099 information return; c) 26 U.S.C. §6041 only requires an individual cashing the ticket to give the name of the actual recipient of the income (not the "true winner"), and then only upon demand by the track. There was simply no evidence of actual demand by the track or proof that the jockeys were to be the actual recipients of the income; d) §6041 which forms the basis for Count VII is overly vague and cannot support a criminal conviction. To premise a criminal prosecution upon a supposed reporting requirement as unclear as this one is offensive to basic concepts of due process of law; and e) Assuming, *arguendo*, that §6041 does require the "actual winner" to be named and is not overly vague, the government presented no evidence that these defendants had, or that there was any probability that they had, notice of the requirement nor any evidence that they possessed the requisite criminal intent to sustain a charge of conspiracy.

26 U.S.C. §7206 (2) punishes whoever "willfully aids or assists in . . . the preparation or presentation . . . of a return, affidavit, claim or other document, which is fraudulent or is false as to any material matter" Assuming, *arguendo*, that the government has presented evidence that the defendants conspired to have Bishop cash the tickets and to file a return signed by someone other than the jockeys with the track, whether or not that activity is in violation of §7206 (2) must depend upon whether 26 U.S.C. §6041 requires the name of the

actual recipient of the income derived from the cashing of the tickets.

The plain language of §6041 clearly does not require the name of the actual recipient except upon demand of the person paying the income. As 26 U.S.C. §6041 (a) requires only the disclosure by the track of the identity of the "recipient of . . . payment", legally sufficient compliance with the requirements of §6041 is made, consequently, by the identification by Form 1099 of the holder or presenter of the winning pari-mutuel ticket, regardless of whether such person is the actual owner of the income. No violation of 26 U.S.C. §7206 (2) is shown because the Form 1099, when it is filed, is not "fraudulent or . . . false as to any material matter . . ." Any doubt that this provision does not require that the actual recipient himself sign the return must be resolved by reference to 26 C.F.R. §1.6041-5. That regulation states:

"When a person receiving a payment described in §6041 is not the actual owner of the income received, the name and address of the actual owner shall be furnished upon demand of the person paying the income, and in default with that compliance the payee becomes liable for the penalties provided."

Thus, since the Internal Revenue Service has interpreted §6041 as requiring the name of the actual recipient only upon demand of the payer and the indictment failed to allege a demand by the payer, an essential element of the offense is lacking in the absence of such a demand. See *United States v. Eller*, 114 F.Supp. 284, 285 (M.D.N.C., 1953). The form which is provided by the race track for those cashing winning tickets provides only for the signature of the payee. There is no notice on the form that the payee must provide the name of the actual recipient of the income.

Assuming, *arguendo*, that §6041 does require the name of the true winner of the tickets and is not overly vague, the government has failed to adduce any evidence that the defendants knew that they were violating a federal revenue law, or intended to do so, when they agreed to have the tickets cashed. See e.g., *United States v. Gisehaltz*, 278 F.Supp. 434, 437 (S.D.N.Y., 1967). According to the testimony of

Carlos Jimenez the defendants only concern was that they, as jockeys, could not cash the tickets and this concern was motivated not by any revenue law but by the rules of the Maryland Racing Commission.

Finally, it is clear that to establish a conspiracy to violate §7206 (2) the government, at a minimum, must show the defendant's knowledge of the unlawful nature of the enterprise. The defendant "*must know that he is violating the federal Internal Revenue Law.*" *United States v. Gisehaltz*, *supra* at 437. Any finding of willfulness depends in part upon whether or not the defendants had actual notice of the requirement for the name and address of the actual recipient. *United States v. Dumaine* 493 F.2d 1257, 1259 (1st Cir., 1974); *Lambert v. California*, 355 U.S. 225 (1957). The only "notice" provided by the track is a fine print provision buried in the program; hardly legal notice under the circumstances. As noted above, the notice provided by this provision is, at best, ambiguous as to what is required of the winner of an \$18.00 ticket. In any case none of the evidence presented by the government indicates that the jockey defendants had notice of the provision nor does it establish the probability of such knowledge. See *Lambert v. California*, *supra* at 227.

In conclusion, there was no evidence that the jockey defendants knew of the supposed requirement that the actual recipient of income must be reported on IRS Form 1099 and "Without the knowledge, the intent cannot exist." *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). Furthermore, the evidence presented by the government did not support a finding that each jockey defendant knowingly entered into an agreement with the others to achieve the unlawful purpose of filing a fraudulent document with the Internal Revenue Service.

V.

THERE WAS A FAILURE TO PROVE USE OF INTERSTATE FACILITIES IN INTERSTATE COMMERCE

For the reasons stated heretofore, since any sports bribery conspiracy which may have been proved as to Count I ended on February 14, there is a failure of proof that this was a

scheme in commerce. With distribution of the tickets on that date, any alleged conspiracy terminated prior to use of any interstate facility.

The use of the telephone, which the government urges supports the Travel Act Counts, is minimal and incidental. Use of the phone was not essential for Vuotto to contact Bishop. He expected to see Bishop "at the track" in Laurel, Maryland as he was accustomed to doing. He "may" have made his first contact with Bishop with respect to cashing the tickets at the track on Monday, February 17. The conduct involved is therefore essentially local and does not represent the activity of organized crime. Recognizing that *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir., 1974) requires distinction, these defendants urge that absent a showing that use of the phone was essential, or at least not minimal or incidental, a judgment of acquittal was required on Counts V and VI or, in the alternative, the issue of minimal use should have been submitted to the jury. See *Rewis v. United States*, *supra*; *United States v. Archer*, 486 F.2d 670 (2d Cir., 1973); *United States v. Altobella*, 442 F.2d 310 (7th Cir., 1971); *United States v. McCormick*, 442 F.2d 316 (7th Cir., 1971).

VI.

THE GOVERNMENT FAILED TO PROVE THESE DEFENDANTS WILLFULLY CAUSED INTERSTATE TRAVEL AND THERE WAS A FAILURE OF PROOF THAT BISHOP, SUMMA AND IACONA DID OR WERE INTENDED TO "DISTRIBUTE" THE PROCEEDS OF BRIBERY

As noted above, Counts V and VI charge that these defendants "did willfully and unlawfully cause" the interstate travel of Summa, Iacona and Bishop. Although the Fourth Circuit apparently held that a knowing use of interstate commerce is not required to convict of a substantive charge of §1952 or for conspiracy or aiding and abetting, *United States v. LeFaivre*, *supra* at 1297, these defendants are here charged with willfully causing the interstate travel in violation of 18 U.S.C. §1952 (a) (1) and 2(b), and accordingly, a knowing or willful violation is required. See *United States v. Barnes*, 383 F.2d 287, 289-93 (6th Cir., 1967) *cert. denied* 389 U.S. 1040 (1968).

18 U.S.C. §2 (b) provides "[W]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." Thus, it is incumbent upon the government to show that the defendants possessed the specific intent which is required under 18 U.S.C. §2, to cause the interstate travel of Summa, Iacona and Bishop. See *United States v. Newman*, 490 F.2d 139, 142, 143 (3rd Cir., 1974). This is not more than common sense since one cannot willfully bring about a result, here interstate travel, without specifically intending to do so.

[T]he requirement that defendant willfully cause the forbidden act to be done, means that the act must not only have been the cause-in-fact of the defendant's activities, but also that defendant have the specific intent of 'bringing about' the forbidden act. *United States v. Kenofsky*, 243 U.S. 440, 37 S.Ct. 438, 61 L.Ed. 836 (1917); *United States v. Leggett*, 269 F.2d 35, 37 (7th Cir., 1959) . . . *United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir., 1970).

In the contest of this case the government must have produced sufficient evidence to show that these defendants, at the time that they agreed to have the tickets cashed, knew that this agreement would require the interstate travel of Summa, Iacona and Bishop. There is an absence of any proof from which it could be reasonably inferred that they had this knowledge.

Counts V and VI allege that these defendants did willfully and unlawfully cause Summa, Iacona and Bishop to travel in interstate commerce with intent to distribute the proceeds of bribery. The evidence adduced at trial does not support the allegation that Summa, Iacona and Bishop in any way distributed or were intended to distribute the proceeds of bribery. According to the testimony of Michael Vuotto, which is the only testimony on this point, Bishop bought the tickets which Vuotto was given by the jockeys. Thus even assuming that the government has established that these tickets were the "proceeds of bribery", there has been no showing that these three defendants did or were intended to distribute these proceeds within the plain meaning of that word. The word "distribute" simply does not encompass the concept of buying tickets or

of taking tickets and cashing them and returning the cash to the person from whom the tickets were obtained.

While this Court has given undoubtedly the most expansive reading to 18 U.S.C. §1952, it has specifically stated that its holdings are based on a literal reading of the plain language of the Travel Act. *United States v. LeFavre, supra*, where it was recognized that *Rewis v. United States, supra*, prohibits extending the language of the Travel Act beyond its literal meaning *United States v. LeFavre, supra* at 1294. Thus, where, as in the instant case, the plain language of the Travel Act simply does not cover the activity charged, it must not be given an expansive reading.

VII.

THE INTERSTATE USE OF A TELEPHONE WAS NOT CAUSED BY THE DEFENDANTS FOR THE PURPOSE OF EXECUTING A SCHEME OR ARTIFICE TO DEFRAUD

It is a specific requirement of the Wire Fraud Statute, 18 U.S.C. §1343, the basis of Counts VIII through X, that the interstate use of a telephone must have been caused by the defendants "for the purpose of executing the scheme or artifice to defraud." In interpreting the language of the Mail Fraud Statute, the Supreme Court has held that one "causes" the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . ." *United States v. Maze*, 414 U.S. 395, 399 (1974). Thus, for Counts VIII through X, the government was required to prove that the jockey defendants either directly caused the use of the interstate telephone facilities or knew that such use would follow as to the cashing of the tickets, or that such use was reasonably foreseeable, even though not actually intended.

The fraud here charged was a uniquely local offense where local jockeys are charged with conspiring together to fix or manipulate a race at a Maryland race track and thereafter to cash tickets at that track. The government failed to present any evidence establishing that use of any interstate facility was

foreseeable. William Vuotto testified that in his conversation with Walsh he indicated only that there were some 30 or 40 people at the track who could cash the tickets. He said nothing and he knew nothing about the two men who eventually presented the tickets for cashing. He had no conversations with any of the other jockey defendants. The sole testimony as to their knowledge was that they understood that William Vuotto was to get the tickets cashed. This evidence does not present a basis to permit a reasonable man to infer beyond a reasonable doubt that the use of an interstate facility was foreseeable from a mutual agreement to get the tickets cashed.

Without knowledge that Vuotto would call someone from out of state, these defendants could not have willfully caused either the interstate travel or the interstate telephone calls. "To establish the intent, the evidence of knowledge must be clear not equivocal." *Direct Sales Co. v. United States, supra* at 711. Nor was there reason to infer that the use of interstate telephone facilities would follow in the ordinary course of business or that such use could be reasonably foreseen. See *United States v. Maze, supra*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1094

UNITED STATES OF AMERICA,
Appellee,

v.

ERIC STEVEN WALSH,
LUIGI GINO and
BENJAMIN MICHAEL FELICIANO,
Appellants.

No. 76-1095

UNITED STATES OF AMERICA,
Appellee,

v.

JESSE DAVIDSON,
Appellant.

No. 76-1096

UNITED STATES OF AMERICA,
Appellee,

v.

EDWARD BISHOP,
Appellant.

No. 76-1100

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS J. SUMMA,

Appellant.

No. 76-1101

UNITED STATES OF AMERICA,

Appellee,

v.

NICHOLAS ANTHONY IACONA,

Appellant.

Appeals from the United States District Court
for the District of Maryland, at Baltimore

Joseph H. Young, District Judge

Argued May 4, 1976

Decided October 21, 1976

Before: BUTZNER, Circuit Judge; FIELD, Senior Circuit
Judge, and WYZANSKI, Senior District Judge*

Peter G. Angelos and H. Russell Smouse *for Appellants* in 76-1094 and 76-1095; Michael S. Frisch, Assistant Federal Public Defender (Charles G. Bernstein, Federal Public Defender and Gerald M. Richman, Assistant Federal Public Defender on brief) *for Appellant* in 76-1101; Leslie L. Gladstone [court-appointed counsel] *for Appellant* in 76-1100 and *for Appellant* in 76-1096; Daniel M. Clements, Assistant United States Attorney (Jervis S. Finney, United States Attorney, Gerard P. Martin, Assistant United States Attorney on brief) *for Appellee* in 76-1094, 76-1095, 76-1096, 76-1100 and 76-1101.

*Honorable Charles Edward Wyzanski, Jr., Senior District Judge, District of Massachusetts, by designation.

FIELD, Senior Circuit Judge:

A Runyonesque gambit at the Bowie Race Track on February 14, 1975, resulted in a very peculiar horse race and a thirteen count indictment by a federal grand jury. Subsequently, the appellants, Walsh,¹ Gino, Feliciano and Davidson, all of whom were jockeys at Bowie, were convicted by a jury in the District Court of Maryland of conspiracy to commit sports bribery in violation of 18 U.S.C. §§224 and 371 (Count One); interstate transportation in aid of racketeering in violation of 18 U.S.C. §1952 (a) (1) (Counts Five and Six); conspiracy to make fraudulent representations to the Internal Revenue Service in violation of 18 U.S.C. §271 and 26 U.S.C. §7206 (2) (Count Seven); and fraud by wire in violation of 17 U.S.C. §1343 (Counts Eight, Nine and Ten). The appellants, Iacona, Summa and Bishop, who were not jockeys but apparently followers of the sport of kings, were also found guilty of the conspiracy in Count Seven of the indictment.

The evidence presented by the Government established the following facts. The four jockey appellants devised a plan to successfully "box" the "Triple" ("Trifecta") in the ninth race on the day in question. To win the Triple a bettor is required to choose the three horses finishing first, second and third in that race. The standard Triple ticket, unlike other wagers at the track, costs three dollars. However, for the convenience of patrons the track permits the purchase of a "box" ticket on the Triple at a cost of eighteen dollars which covers the selected three horses regardless of the order of finish. Since a "box" ticket contains all six possible combinations of finish for any three given horses, it necessarily includes only one winning three dollar wager and five losing three dollar wagers.

The jockeys decided to bend their efforts to bring about a winning combination of "2-8-12", and garnered enough money to purchase thirty-eight "box" tickets on that combination. Having purchased the tickets, the jockeys rode their mounts in the race and the order of finish was "8-12-2". Accordingly,

¹Eric Stephen Walsh died while this appeal was pending and an order was entered abating the judgment of his conviction and dismissing the indictment against him. However, for the purposes of clarity and continuity, he will be referred to in this opinion as one of the appellants.

the jockeys owned thirty-eight of the sixty-two winning eighteen dollar tickets in the betting pool for the Triple. One of the track supervisors noticed that the ratio of winning eighteen dollar tickets was three to one over the number of winning three dollar tickets, and it occurred to him that this was rather strange since the normal ratio was approximately fifty-fifty. The fact that thirty-nine out of the total of sixty-two winning eighteen dollar tickets had been purchased at one window in the clubhouse aroused further suspicions. This circumstance was compounded by the observation of the track stewards who were impressed by the highly irregular manner in which some of the jockeys handled their mounts during the race. A review of the track films confirmed the stewards' belief that something was amiss, and an investigation of the race was initiated.

Meanwhile the jockeys were attempting to realize the profits from their winning tickets which presented a greater problem than they had anticipated. Luigi Gino sought the assistance of one Heddy Sue May who made an unsuccessful attempt to cash two of his tickets. She testified that Gino informed her that "two guys from Pennsylvania" would be coming in to cash the tickets. The services of these "ten-percenters"² were procured by William Vuotto, an agent of jockey Walsh, who testified that he called the appellant Eddie Bishop from his home in Maryland. He further testified that Bishop who lived in Delaware advised him that he had obtained some individuals to cash the tickets. Iacona and Summa, whose services had been enlisted by Bishop, attempted to redeem the tickets on February 19, 1975, but were unsuccessful. When Iacona attempted to cash the tickets, he told the track officials that he and Summa had pooled their money and purchased the tickets for the, now, infamous ninth race. Frustrated in their attempt to cash the tickets, Iacona and Summa left the ticket windows and were followed by a track detective who observed that their automobile carried a Pennsylvania license tag and obtained the number. The tickets were returned to Bishop, who gave them to Walsh, and Bishop testified that on the

²A "ten-percenter" is one who, for a fee amounting to ten percent of the winnings, cashes tickets for others and completes the required Internal Revenue Service form. See, *United States v. Lincoln*, 472 F.2d 1183 (5 Cir. 1973).

following day, February 20th, Walsh told him that the tickets had been destroyed and that he should forget about the entire transaction.

I.

The threshold issue on this appeal is whether 18 U.S.C. §224 applies to a conspiracy among the contestants as opposed to one involving individuals who are not contestants and attempt to bribe those actually involved in the sport. We find nothing in the express language of the statute to indicate that it was intended to apply only to bribery on the part of those who are not participating in the contest. The statute provides, in part:

"Whoever carries into effect, attempts to carry into effect, or conspires with *any other person* to carry into effect any scheme in commerce to *influence, in any way*, by bribery any sporting contest * * *." (Emphasis added). The statutory language does not purport to limit its application, and "[w]here the power of Congress is clear, and the language of exercise is broad, we perceive no duty to construe a statute narrowly." *United States v. Erdos*, 474 F.2d 157, 160 (4 Cir.), *cert. denied*, 414 U.S. 876 (1973). It occurs to us that a plain reading of the statute indicates that it is designed to encompass bribery schemes originated by participants in a sporting contest as well as those initiated by "outsiders".

While we recognize that the primary purpose of the legislation was to assist the "Federal Government in the assault on organized crime," the Legislative History supports the proposition that Section 224 was intended to "include players and officials as well as gamblers and fixers."³ The Legislative History further indicates that the Congress was of the opinion that the infiltration of sports by organized gambling could be materially inhibited "by punishing any players or officials as well as gamblers who attempt to corrupt * * * for personal gain."⁴

³109 Cong. Rec. 4107 (1963) (remarks of Congressman Lindsay).

⁴109 Cong. Rec. 2016 (1963) (remarks of Senator Keating). See 110 Cong. Rec. 920 (1964) (remarks of Congressman Corman); 110 Cong. Rec. 921-22 (1964) (remarks of Congressman McCulloch).

Finally, we note that Section 224 was enacted to remedy the inability of prosecutors to utilize 18 U.S.C. §1952 to effectively deal with the problem of sports bribery.⁵ In Section 1952, the Travel Act, the term "unlawful activity, includes, in part, extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." Judicial interpretation of the Travel Act has recognized that "Congress did not choose to direct the prohibitions of section 1952 against only those persons who could be shown to be members of an organized criminal group * * *." *United States v. Roselli*, 432 F.2d 879, 885 (9 Cir. 1970), *cert. denied*, 401 U.S. 924, *reh. denied*, 402 U.S. 924 (1971) (footnote omitted). See *United States v. Peskin*, 527 F.2d 71, 76-77 (7 Cir. 1975). Similarly, we conclude that Section 224 was designed to cover a greater range of offenders than those involved in organized crime, and since the statute specifically includes "players", it would be unreasonable to limit its application to non-contestants.

The further argument of the appellants that horse racing is not a "sporting contest" within the meaning of Section 224 (c) (2) is utterly without merit. History, logic and common sense reject such an argument, and the further contention that horse racing does not fall within the statute because it is a competition between horses and not individual contestants is equally specious. If a decisional answer to such an argument is required, it may be found in *United States v. Pinto*, 503 F.2d 718, 724 (2 Cir. 1974), where the court stated that the argument:

"rests on the surprising assertion that a harness race is not a 'sporting contest' within the meaning of 18 U.S.C. §224 (c) (2) since it involves animals rather than 'individual contestants'. However, the word 'individual' when used as an adjective does not necessary [sic] pertain to humans only, see Webster's Third New International Dictionary 1152, and the legislative history manifests a Congressional intent to prohibit bribery of any person who can *influence* sports results. See H. Rep. 1053, 2 U.S. Code Cong. & Admin. News p. 2250 (1964). Furthermore, the drivers who are undeniably

⁵110 Cong. Rec. 921 (1964) (remarks of Congressman McCulloch).

'individuals', are an essential part of the contest, which frequently turns on their respective skills." (Emphasis by the court).

II.

Iacona, Summa and Bishop seek reversal of their convictions on the conspiracy charge, contending that the district court improperly denied their motion for a severance from the other defendants. The rule of long standing in this circuit is that

"the question of severance or common trial is vested under Rule 14 in the sound discretion of the trial judge and his decision will be reversed on appeal only upon a clear abuse of that discretion."

Cataneo v. United States, 167 F.2d 820, 823 (4 Cir. 1948). See *United States v. Boswell*, 372 F.2d 781, 784 (4 Cir.), cert. denied, 387 U.S. 919 (1967); *United States v. Miller*, 340 F.2d 421, 423 (4 Cir. 1965). We have further held that denial of a motion for severance will not be deemed reversible unless an appellant demonstrates that it resulted in a degree of prejudice so substantial "that the defendants did not receive a fair trial, that 'a miscarriage of justice' has occurred." *United States v. Frazier*, 394 F.2d 258, 260 (4 Cir.), cert. denied, 393 U.S. 984 (1968).

These appellants contend, however, that the evidence demonstrated the existence of two separate and distinct conspiracies and suggest that this case falls within the rationale of *Kotteakos v. United States*, 328 U.S. 750 (1946). Their reliance upon that case is misplaced since we are dealing here with a "chain" conspiracy rather than a "wheel" conspiracy which was the subject of *Kotteakos*. In *United States v. Cobb*, 446 F.2d 1174 (2 Cir.), cert. denied, 404 U.S. 984 (1971), the court was confronted with a conspiracy somewhat similar to that in the present case. In distinguishing *Kotteakos*, the Second Circuit held that "[i]n contrast, the defendants' conspiracy here-in had as its object a 'single unified purpose' or 'common end', i.e., the cashing of winning tickets while concealing from the Government the identity of the true recipient." 446 F.2d at 1177. Under the circumstances, the action of the trial court in denying the motion for severance was not an abuse of discretion.

III.

In addition to the severance issue, Iacona, Summa and Bishop join the jockey appellants in urging upon us that the evidence was insufficient to warrant their convictions under Count Seven of a conspiracy to violate 26 U.S.C. §7206 (2), and they suggest, among other things, that there is no evidence indicating that the jockeys had knowledge of the Internal Revenue Service requirement. To accept this argument would require a degree of naivete on our part which we are unwilling to concede.

The Daily Racing Program at Bowie carried an explicit statement of the circumstances under which the actual owner was to be identified when presenting a winning ticket,⁶ and the jury could fairly infer that the jockeys as well as habitués of the track were aware of the tax law requirements. Scienter on the part of Iacona and Summa was evidenced by their false statement to the track officials that they had purchased the tickets with their own money. The prosecution of "ten-percenters" under such circumstances for violation of Section 7206 (2) is not uncommon. See *United States v. Lincoln*, 472 F.2d 1183 (5 Cir. 1973); *United States v. Kessler*, 449 F.2d 1315 (2 Cir. 1971). Similarly, the conviction of those procuring the services of such "ten-percenters" to cash their winning tickets has been upheld. See *United States v. Dumaine*, 493 F.2d 1257 (1 Cir. 1974).

There is ample support in the record for the conclusion that the jockeys knew that the law required disclosure of their ownership of the tickets, and it was for this reason that they sought the services of Bishop, Iacona and Summa. The fact that their primary purpose was to conceal that the race had

⁶The Bowie program of February 24, 1975, carried a notice reading as follows:

Before receiving payment of \$600 or more for a \$2 wager, or \$900 or more for a \$3 wager, a person presenting a winning ticket (payee) must provide proper identification. The required identification must be the name, address, Social Security number of the actual winner, that is the person owning the winning ticket. The identity of the actual winner is furnished to the Internal Revenue Service for determination of income tax liability. It is a violation of Federal law to furnish false information or to aid or assist another in furnishing false information.

District Director, Internal Revenue Service.

been fixed is of no moment. It is sufficient that as a part of the scheme they also conspired to make the false and fraudulent representations to the Internal Revenue Service. It is well settled that a single conspiracy may have a multiplicity of objectives, "and if one of its objectives, even a minor one, be the evasion of federal taxes, the offense is made out, though the primary objective may be the concealment of another crime." *Ingram v. United States*, 360 U.S. 672, 679-80 (1958), *reh. denied*, 361 U.S. 856 (1959). As to the non-jockey appellants, they well knew that they were being retained to falsely represent to both the track officials and the Internal Revenue Service that they, rather than the jockeys, were the owners of the winning tickets and this was sufficient to bring them within the range of the conspiracy for which they were convicted.

IV.

The jockey appellants also contend that the evidence was insufficient to establish their guilt of either bribery or conspiracy to commit bribery. Bearing in mind "that the verdict of the jury must be sustained 'if there is substantial evidence, taking the view most favorable to the Government, to support the findings of guilt'," *United States v. Holt*, 529 F.2d 981, 984 (4 Cir. 1975), we find in the record a sound basis for the convictions.

We will not indulge in a minute review of the testimony relative to the manner in which the jockeys manipulated their mounts during the course of the race. Suffice it to say that the evidence, including the official race films, presented a picture of misconduct that at times bordered on the bizarre. Additionally, Carlos Albert Jimenez, one of the jockeys who rode in the ninth race, testified that prior to the race he was approached by Feliciano who asked him to "pull" his horse. Jimenez replied "O.K." and Feliciano told him that it would cost \$150.00. Later Jimenez approached Gino, stating "My money is in, and I don't know what happened," whereupon Gino cryptically replied "2-8-12". Jimenez testified that this information was sufficient for him. Jimenez further testified that Jesse Davidson met with him and Gino after the race at which time Davidson gave Jimenez five of the winning tickets. Jimenez cashed two

of these tickets but later returned three of them to Walsh at the latter's request.

In our opinion the offer of the appellants to include Jimenez in the betting pool in exchange for his agreement to "pull" his horse was sufficient to support the charge of bribery, and the evidence in its entirety supported the convictions on the conspiracy count.

We have given careful consideration to the other assignments of error, including the challenges of the Travel Act and wire fraud counts, and find no error. Accordingly, the convictions are affirmed.

A F F I R M E D .

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §2: Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct 31, 1951, c. 655, §17b, 65 Stat. 717.

18 U.S.C. §224: Bribery in Sporting Contests

(a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both.

(b) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

(c) As used in this section—

(1) The term "scheme in commerce" means any scheme effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication;

(2) The term "sporting contest" means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term "person" means any individual and any partnership, corporation, association, or other entity.

Added Pub.L. 88-316, §1(a), June 6, 1964, 78 Stat. 203.

18 U.S.C. §371: Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645 62 Stat. 701.

18 U.S.C. §1343: Fraud By Wire, Radio, or Television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, §18 (a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.

18 U.S.C. §1951: Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102 (6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, §701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

26 U.S.C. §6041: Information at Source

(a) Payments of \$600 or more.—All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments to which section 6042(a) (1), 6044(a) (1), or 6049(a) (1) applies, and other than payments with respect to which a statement is required under the authority of section 6042(a) (2), 6044(a) (2), 6045, 6049(a) (2), or 6049(a) (3), of \$600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Secretary or his delegate, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary or his delegate, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

(b) Collection of foreign items.—In the case of collections of items (not payable in the United States) or interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by any person undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange, such person shall make a return according to the forms or regulations prescribed by the

Secretary or his delegate, setting forth the amount paid and the name and address of the recipient of each such payment.

(c) Repealed. Pub.L. 87-834, §19(f) (2), Oct. 16, 1962, 76 Stat. 1058.

(d) Recipient to furnish name and address.—When necessary to make effective the provisions of this section, the name and address of the recipient of income shall be furnished upon demand of the person paying the income. Aug. 16, 1954, c.736, 68A Stat. 745; Oct. 16, 1962, Pub.L. 87-834, §19(f), 76 Stat. 1058.

26 U.S.C. §7206 (2): Fraud and False Statements

Any person who—

* * * *

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

* * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug.16, 1954, c. 736, 68A Stat. 852.

28 U.S.C. §1254 (1): Courts of Appeals: Certiorari; Appeal; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * *

26 C.F.R. §1.6041.5: Information as to Actual Owner

When a person receiving a payment described in section 6041 is not the actual owner of the income received, the name and address of the actual owner shall be furnished upon demand

of the person paying the income, and in default of compliance with such demand the payee becomes liable for the penalties provided. See section 7203.

Md. Crim. Law Code Ann. §24: Bribing Participant, etc., in Athletic Contest; Witnesses in Prosecution

Any person or persons who shall bribe or attempt to bribe any persons participating in or connected in any way with any athletic contest held in this State shall be deemed guilty of bribery, and on being convicted thereof shall be fined not less than one hundred dollars (\$100.00) nor more than five thousand dollars (\$5,000.00), or, in the discretion of the court shall be sentenced to be imprisoned in the penitentiary of this State for not less than six months nor more than three years, or both fined and imprisoned; and any person so bribing or attempting to bribe or so demanding or receiving a bribe shall be a competent witness, and compellable to testify against any person or persons who may have committed any of the aforesaid offenses; provided, that any person so compelled to testify in any such case shall be exempt from trial and punishment for the crime of which such person so testifying may have been a participant. (An. Code, 1951, §30; 1939, ch. 612.)

Nos. 76-711, 76-5691, and 76-5715

In the Supreme Court of the United States

OCTOBER TERM, 1976

BENJAMIN MICHAEL FELICIANO AND
JESSE DAVIDSON, PETITIONERS

v.

UNITED STATES OF AMERICA

NICHOLAS ANTHONY IACONA, PETITIONER

v.

UNITED STATES OF AMERICA

EDWARD BISHOP AND
LOUIS J. SUMMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Supreme Court, U. S.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Feliciano Pet. App. 1A-11A)¹ is reported at 544 F. 2d 156.

¹"Feliciano Pet." refers to the petition in No. 76-711. "Iacona Pet." refers to No. 76-5691. "Bishop Pet." refers to No. 76-5715.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1976. The petitions for a writ of certiorari were filed on November 15, 1976 (No. 76-5691), November 18, 1976 (No. 76-5715), and November 20, 1976 (No. 76-711). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set out at Feliciano Pet. App. 12A-16A.

QUESTIONS PRESENTED

1. Whether the sports bribery statute, 18 U.S.C. 224, applies to horse racing (petitioners Feliciano and Davidson).
2. Whether the evidence was sufficient to support petitioners' conviction of conspiracy to commit sports bribery (petitioners Feliciano and Davidson).
3. Whether the evidence was sufficient to support petitioners' Travel Act convictions (petitioners Feliciano and Davidson).
4. Whether knowledge that interstate communications facilities have been used is an element of wire fraud (petitioners Feliciano and Davidson).
5. Whether the trial court erred in instructing the jury on the wire fraud counts of the indictment (petitioners Feliciano and Davidson).
6. Whether the evidence was sufficient to support petitioners' convictions of conspiring to make fraudulent representations to the Internal Revenue Service (all petitioners).
7. Whether the trial court abused its discretion in denying petitioners' motions for severance (petitioners Summa, Iacona and Bishop).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, all petitioners were convicted of conspiring to make fraudulent representations to the Internal Revenue Service, in violation of 18 U.S.C. 371 and 26 U.S.C. 7206(2). In addition, petitioners Feliciano and Davidson were convicted of conspiracy to commit sports bribery, in violation of 18 U.S.C. 224; of two counts of causing interstate travel to distribute the proceeds of an unlawful activity, in violation of 18 U.S.C. 1952 and 2; and of three counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioners Iacona, Summa and Bishop were sentenced to three years' imprisonment, suspended in favor of three years' probation. Petitioners Feliciano and Davidson were sentenced to concurrent terms of three years' imprisonment and fined a total of \$7,000 each; all but six months of the imprisonment was suspended in favor of three years' probation. The court of appeals affirmed.

The evidence at trial established that on February 14, 1975, a group of jockeys, including petitioners Feliciano and Davidson, combined their efforts to bring about a particular winning combination in the "Triple"² in the ninth race at Bowie Race Track in Bowie, Maryland (Feliciano Pet. App. 4A).

Petitioners Davidson and Feliciano, co-defendants Eric Walsh and Luigi Gino, and unindicted co-conspirators John Baboolal and Carlos Jimenez were among the twelve jockeys scheduled to ride in the ninth race at Bowie. These jockeys contributed \$680 to a fund used to purchase 38

²To win the "Triple" wager a bettor is required to select, in order, the three horses finishing first, second, and third (*ibid.*).

"box" tickets³ on a three-horse combination in the Triple.⁴ This combination did not include any of the horses being ridden by the jockeys participating in the betting (Tr. 24-26, 775-776); they planned, however, to hold back their horses, thus causing the other horses in the race to finish ahead.

The Triple was won by the three horses on which they had wagered. After the race Gino distributed the 38 winning tickets, each worth more than \$900, among the participating jockeys (Tr. 91, 565). Unfortunately for petitioners, however, supervisors at the race track noticed an unusual betting pattern, and the track stewards concluded that some of the jockeys had handled their horses in an irregular manner. They began to investigate the race (Tr. 55-57, 154-162).

After Hedy Sue Way, a friend of Gino's, unsuccessfully attempted to cash two of the winning tickets for Gino on the day following the race, the jockeys decided to collect all the tickets and have them cashed through jockey Eric Walsh's agent, William Vuotto (Tr. 248-252, 94, 97, 566-567, 796, 800). Gino informed Way that "they were bringing in two men from Pennsylvania" to cash the tickets (Tr. 257, 306).

³The standard Triple ticket costs three dollars. For \$18 patrons may purchase a "box" ticket, which covers the selected three horses regardless of the order of finish. Since a "box" ticket contains all six possible orders of finish for any three horses, it necessarily includes not more than one winning three dollar wager and at least five losing three dollar wagers. See Feliciano Pet. App. 4A.

⁴Petitioner Feliciano had approached Jimenez and asked him if he liked his horse in the ninth race. Jimenez answered that he did, and Feliciano asked Jimenez if he wanted to "pull" the horse (Tr. 83-84). Jimenez agreed to do so, and his valet subsequently gave Feliciano \$90. Immediately before the ninth race Jimenez told Gino that "my money is in," and Gino responded by telling Jimenez the number of the three horse combination on which the wager had been placed (Tr. 85-86).

The services of these "ten percenters"⁵ were procured by Vuotto at the request of Walsh (Tr. 341). On February 18, 1975, Vuotto, from his home in Maryland, telephoned petitioner Bishop in Delaware (Tr. 343-345). In that conversation, and in a second conversation the following day, Bishop agreed to provide someone to cash the tickets (Tr. 345-346). Vuotto subsequently delivered the tickets to Bishop, and petitioners Iacona and Summa attempted to redeem them at the race track, claiming that they were the owners of the tickets. They were unsuccessful, however, and departed with the tickets (Tr. 406-407, 410-415). The tickets were returned through Bishop and Vuotto to Walsh (Tr. 349-350). Walsh and Feliciano then burned the tickets (Tr. 691).

ARGUMENT

1. Petitioners Feliciano and Davidson assert that 18 U.S.C. 224, which proscribes bribery in any "sporting contest," does not apply to horse races (Feliciano Pet. 16-17).

The term "sporting contest" is defined by Section 224 (c)(2) as "any contest in any sport, between individual contestants or teams of contestants * * *." Petitioners' argument that horse racing is not a sporting contest because horses are not "individual contestants" is insubstantial. The horses are individual contestants, and the jockeys are undeniably "individuals" who are an essential part of the contest. See *United States v. Pinto*, 503 F. 2d 718, 724 (C.A. 2).

2. There was ample evidence to support the convictions of Feliciano and Davidson of conspiracy to commit sports bribery. The jockeys pooled purchase money for the winning tickets, the tickets were jointly purchased, and after

⁵A "ten-percenter" is one who, for a fee amounting to ten percent of the winnings, cashes tickets for others and completes the required Internal Revenue Service form. See *United States v. Lincoln*, 472 F. 2d 1183 (C.A. 5).

the race a joint effort was made to cash the tickets. There was direct evidence that Carlos Jimenez agreed to hold up his horse in exchange for being allowed to join in the betting pool (Tr. 83-86; this exchange of money was a bribe just as if the other jockeys had paid Jimenez a fixed sum of money to hold back his mount. Petitioners offered Jimenez something of value—a share in any winnings—in exchange for his promise not to compete properly. It should make no difference whether or not the persons offering the inducement are fellow competitors (a boxer could bribe his opponent to “take a dive”) and whether or not the inducement is a definite sum (in the case of the boxer, as here, the inducement may be a portion of the winnings). The evidence that the participating jockeys agreed with each other to influence the race by inhibiting their horses and to profit by wagering on the selected combination therefore supports the conviction.⁶ See *United States v. Gerry*, 515 F. 2d 130, 134-136 (C.A. 2), certiorari denied, 423 U.S. 832.

The argument (Feliciano Pet. 14-15) that the evidence did not establish the interstate commerce element of 18 U.S.C. 224 is incorrect. The jockeys embarked upon a plan to make a profit by generating and cashing winning tickets. A conspiracy of this sort encompasses the means used to achieve its objectives, and here those means included the jockeys' efforts to obtain the fruits of their crime. See *United States v. Reynolds*, 511 F. 2d 603, 607 (C.A. 5); *United States v. Iacovetti*, 466 F. 2d 1147, 1153

⁶There is consequently nothing to the assertion (Feliciano Pet. 7-10) that the trial court erred in instructing the jury that the conspiracy to commit sports bribery could be established by proof of a conspiracy to bribe “jockeys” rather than requiring a finding of a conspiracy specifically to bribe Jimenez. The jockeys offered inducements to each other, and a bribe occurred each time another jockey agreed to take part in the venture.

(C.A. 5). Those efforts involved a “scheme in commerce,” because the statute defines that term as “any scheme effectuated in whole or in part through the use in interstate * * * commerce of any facility for transportation or communication” (18 U.S.C. 224(c)(1)).

3. Petitioners Feliciano and Davidson contend that their convictions under the Travel Act, 18 U.S.C. 1952, should be set aside because the evidence did not show that they knew that interstate travel was to be used in distributing the bribery proceeds and because the interstate travel involved was not intended to “distribute” the bribery proceeds (Feliciano Pet. 21-23).

The Travel Act, however, does not require a “knowing” use of facilities in interstate commerce. See *United States v. LeFaivre*, 507 F. 2d 1288, 1297 (C.A. 4), certiorari denied, 420 U.S. 1004; *United States v. Colacurcio*, 499 F. 2d 1401 (C.A. 9). The only knowledge or intent required by the Travel Act is “intent to * * * distribute the proceeds of any unlawful activity.” 18 U.S.C. 1952 (a)(1).

a. The fact that petitioners did not themselves participate in the interstate travel is immaterial. This Court held in *United States v. Feola*, 420 U.S. 671, 696, that “where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.” One who aids or abets an unlawful activity need only share the same criminal intent as the principal, see *Snyder v. United States*, 448 F. 2d 716, 718 (C.A. 8), and under the Travel Act a person may be guilty of aiding and abetting the offense without knowledge of the use of interstate facilities. *United States v. LeFaivre, supra*; *United States v. Villano*, 529 F. 2d 1046 (C.A. 10), certiorari denied, June

21, 1976 (No. 75-1349). Petitioners Feliciano and Davidson, who caused petitioners Bishop, Iacona and Summa to travel interstate, do not escape responsibility because they did not know where the "ten percenters" would come from.

United States v. Barnes, 383 F. 2d 287 (C.A. 6), certiorari denied, 389 U.S. 1040, held that, although the actual user of interstate facilities need not know of the federal jurisdictional element, some showing of knowledge was required to convict those charged as co-conspirators or as aiders and abettors. The Sixth Circuit has adhered to *Barnes* even after *Feola*, and has held that, to be guilty of a conspiracy to violate the Travel Act, or as an aider or abettor of a Travel Act violation, the defendant must have known that interstate facilities would be used. *United States v. Prince*, 529 F. 2d 1108 (C.A. 6). Cf. *United States v. Eisner*, 533 F. 2d 987, 990 n. 3 (C.A. 6), certiorari denied, November 1, 1976 (No. 76-31) (summarizing *Barnes* and *Prince* as holding that "each defendant must have reason to know of the use of an interstate facility").

We believe that *Prince* was wrongly decided. We recognize that it appears to conflict with *LaFaivre* and, if *Prince* establishes a firm rule that a person, to be guilty of aiding and abetting a Travel Act violation, must know that the principal will use interstate facilities, then it conflicts with the instant case as well. But we submit that the contours of any conflict among the circuits are not yet so well established that resolution by this Court is appropriate.⁷

Prince appears to be internally inconsistent. Although seemingly erecting a requirement of knowledge for a conspirator or aider and abettor, it states (529 F. 2d at 1112)

⁷Moreover, the sentences of imprisonment on the Travel Act counts run concurrently with petitioners' sentences on the other four counts. Although petitioners were fined \$3,000 on the Travel Act counts, the existence of a fine is not ordinarily sufficient to call for plenary review by this Court.

that if a person actually "causes" interstate travel, he need not know of the presence of the jurisdictional element of the Travel Act to have committed the substantive offense. This divergence of treatment is inconsistent with the rationale of *Feola*. The court in *Prince* does not explain why the person charged as an aider or abettor must have a greater knowledge of the jurisdictional element of the offense than the principal. Nor does the court explain why an aider or abettor does not "cause" the travel to be committed fully as much as the principal. In the instant case, for example, Vuotto caused petitioners Iacona, Bishop and Summa to travel from Pennsylvania to Maryland, but petitioners Feliciano and Davidson caused Vuotto to cause this travel. It is possible that in a subsequent case the Sixth Circuit would conclude that causation of this sort makes it unnecessary to show that the aiders and abettors knew that the travel would be interstate.

Moreover, *Prince* neglected the ordinary rule (see *Pinkerton v. United States*, 328 U.S. 640) that when two or more persons engage in a joint venture, each of them is responsible, as a principal, for any substantive crimes committed by the others in furtherance of the venture. Petitioners Feliciano and Davidson therefore stand in the shoes of Vuotto, who clearly had the requisite knowledge. In *Feola* itself, the Second Circuit relied on this principle to hold Feola responsible as a principal for the substantive crime of assault on a federal officer, despite the court of appeals' assumption that knowledge of the jurisdictional requirement was an element of the conspiracy to commit that offense. *United States v. Alsondo*, 486 F. 2d 1339, 1346 (C.A. 2), reversed in part on other grounds *sub nom. United States v. Feola*, 420 U.S. 671. It seems reasonable to suppose that, given the opportunity for further reflection, the Sixth Circuit would conclude that the prosecution need not prove that persons similarly situated to petitioners Feliciano and Davidson had knowledge of the use of interstate facilities.

b. Petitioners Feliciano and Davidson contend that the evidence was insufficient to support their Travel Act convictions because the travel of Bishop, Iacona and Summa was not intended to distribute the proceeds of the bribery.⁸ The wagering tickets, however, were worthless until they were cashed, and the efforts of Bishop, Iacona and Summa to convert the tickets into cash were therefore an integral part of the effort to distribute the fruits of the criminal enterprise.

4. Petitioners Feliciano and Davidson argue that their wire fraud convictions are invalid because the evidence did not show that they knowingly used interstate communications facilities to carry out their scheme, and that the evidence was insufficient to establish that they "knowingly" caused the use of such facilities in carrying out their scheme to defraud (Feliciano Pet. 23-24).

This contention is insubstantial. The wire fraud statute punishes "[w]hoever, having devised * * * any scheme or artifice to defraud * * * transmits or causes to be transmitted by means of wire * * * in interstate or foreign commerce, * * * for the purpose of executing such scheme * * * ." 18 U.S.C. 1343. "[T]here is no requirement under 18 U.S.C. §1343 that the accused know that instrumentalities of interstate communication are used or foresee that such instrumentalities may be used." *United States v. Blassingame*, 427 F. 2d 329, 331 (C.A. 2), certiorari denied, 402 U.S. 945.⁹

⁸Petitioners Feliciano and Davidson maintain (Feliciano Pet. 21) that the use of telephone facilities was too minimal to establish the federal jurisdictional element in the Travel Act counts. See *Rewis v. United States*, 401 U.S. 808. The use of telephone facilities, however, was not the sole basis of the Travel Act counts. These counts alleged that Bishop, Iacona and Summa traveled interstate to obtain and to distribute the proceeds of the sports bribery.

⁹Petitioners mistakenly rely on *United States v. Maze*, 414 U.S. 395. In *Maze* the Court considered the provisions of the mail fraud statute, 18 U.S.C. 1341, which, unlike the statute in question here, specifically requires that the use of the mails be "knowingly cause[d]."

5. Petitioners Feliciano and Davidson also assert (Feliciano Pet. 10-12) that the trial court erred in refusing to instruct the jury that conviction on the wire fraud counts required a finding that the jockeys intended to "fix" the race.

The basis of the offense alleged in the wire fraud counts was not the jockeys' intent to "fix" the race; it was, rather, the breach of their fiduciary duty to their employers and to the track, and the breach was demonstrated by proof that they placed wagers on horses they were not riding.¹⁰ Proof of a violation of the wire fraud statute does not require evidence that a deceptive scheme was intended to defraud persons of money. See *United States v. Brown*, 540 F. 2d 364, 374 (C.A. 8). A deceptive scheme violates the statute if it deprives persons of significant intangible rights, including the right to honest fiduciary services. See *United States v. Isaacs*, 493 F. 2d 1124, 1149-1150 (C.A. 7), certiorari denied, 417 U.S. 976 (right of Illinois citizens to honest and faithful services of governor); *United States v. George*, 477 F. 2d 508, 512-513 (C.A. 7), certiorari denied, 414 U.S. 827 (right of corporation to faithful services of employee).

The trial court's instructions correctly stated these principles. They required the jury to find that petitioners had a fiduciary relationship to the owners or trainers of the horses they rode, or to the state racing commission, or to the bettors; that they breached that relationship by purchasing tickets on competing horses; and that they intended some actual harm to those to whom they had a fiduciary relationship (Tr. 955).

6. Petitioners argue that there was no evidence that they knew of the Internal Revenue Service (IRS) rule

¹⁰At the time in question, the Maryland Thoroughbred Rules of Racing §09.10.20.13 provided in pertinent part that "no jockey shall bet on any race except * * * on the horse which he rides."

requiring the reporting of the identity of the actual winners of large wagers that are collected. Therefore, they maintain, the evidence was insufficient to support their convictions for conspiring to make false representations to the IRS (Feliciano Pet. 18-20; Iacona Pet. 4; Bishop Pet. 5-10).

This contention was properly rejected by the court of appeals (Feliciano Pet. App. 9A-10A). There was ample evidence of knowledge. The daily racing program at Bowie carried an explicit notification that the identity of the actual owner of tickets paying \$900 or more on a \$3 wager was required to be provided to the IRS (Tr. 508) and thus "the jury could fairly infer that the jockeys as well as habitues of the track were aware of the tax law requirements" (Pet. App. 9A). Indeed, the fact that petitioners Iacona and Summa falsely represented that they were the owners of the tickets, and the evidence that the non-jockeys were to receive a 10-percent fee for cashing the tickets (Tr. 348), supports the conclusion that they were aware of the illegal nature of their actions. Moreover, petitioner Feliciano admitted at trial that he knew it was his obligation as the true owner to fill out the tax form (Tr. 688).¹¹ See *United States v. Dumaine*, 493 F. 2d 1257 (C.A. 1).

7. Petitioners Iacona, Summa and Bishop urge that the evidence established the existence of separate conspiracies and, relying on *Kotteakos v. United States*, 328

¹¹Petitioners' contention that only the identity of the recipient of the payment is required, absent a specific demand for information about the "actual owner," has been rejected by every court of appeals to consider the question. *United States v. Dumaine*, *supra*; *United States v. Haimowitz*, 404 F. 2d 38 (C.A. 2); see also *United States v. Lincoln*, 472 F. 2d 1183 (C.A. 5).

U.S. 750, contend that the trial court therefore erred in denying their motions for severance (Iacona Pet. 3-4; Bishop Pet. 10).

A motion for severance is addressed to the sound discretion of the trial court, *Opper v. United States*, 348 U.S. 84, 95, and the district court's action will not be set aside absent clear evidence of prejudice. *Schaffer v. United States*, 362 U.S. 511; *United States v. Catina*, 500 F. 2d 1319, 1326 (C.A. 3), certiorari denied, 419 U.S. 1047. There was no abuse of discretion here. As the court of appeals properly held, the evidence established a conspiracy among all petitioners with the object of cashing the winning tickets while concealing the identity of the beneficiaries (Feliciano Pet. App. 8A). See *United States v. Cobb*, 446 F. 2d 1174 (C.A. 2), certiorari denied, 404 U.S. 984. A joint trial was therefore proper.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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